No. 138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Petitioner,*

v.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.,

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT AMERICAN-FOREIGN STEAMSHIP CORP.

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April, 1960.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York dated May 11, 1956 (R. 64) is reported as *A. H. Bull Steamship Co.* v. *United States*, 141 F. Supp. 58. The opinion of the three-judge panel of the Court of Appeals dated September 25, 1957 (R. 104), the opinion of the Court of Appeals on rehearing in banc dated July 28, 1958 (R. 115), and the opinion of the Court of Appeals denying the Government's Petition for Further Rehearing in banc dated March 26, 1959 (R. 137), are reported at 265 F. 2d 136, *et seq.*

JURISDICTION

The jurisdictional requisites are adequately set forth in the brief for the United States.

QUESTION PRESENTED

Is an in banc decision of a court of appeals invalid because an active circuit judge of the circuit, who was a member of the court in banc, retired from regular active service after the case had been committed to the consideration of the court and thereafter participated in the court's decision.

STATUTES INVOLVED

28 U.S.C. 43(b) provides:

> Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court.

28 U.S.C. 46 provides:

> (a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.
>
> (b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.
>
> (c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

Relevant portions of other statutory provisions are set forth in the Appendix, *infra*, p. 49.

STATEMENT

1. Respondent's cause of action

Respondent is a steamship company which chartered certain war-built vessels from the Maritime Commission in 1946 and 1947 in accordance with Section 5 of the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1738). Respondent is suing the Government under the Suits in Admiralty Act (46 U.S.C. 741, *et seq.*) because the Maritime Administration[1] breached the Maritime Commission's agreement in Clause 13 of the charter to refund certain excessive preliminary payments of so-called "additional charter hire" upon the completion of final audit of respondent's account.

From June through August 1946, respondent had chartered certain war-built vessels from the War Shipping Administration under a form of bareboat charter known as Warshipdemiseout Form 203 (R. 2/3). By Section 202 of the Act of June 8, 1946 (60 Stat. 481, at 501) the War Shipping Administration was abolished and its functions transferred to the United States Maritime Commission effective September 1, 1946. In the early part of August 1946, the Maritime Commission announced that it intended to

[1] The chartering functions of the Maritime Commission were transferred to the Maritime Administration effective May 24, 1950 in accordance with Reorganization Plan No. 21 of 1950 (64 Stat. 1273, *et seq.*). See note set out under 46 U.S.C.A. 1111.

cancel all War Shipping Administration charters effective as of August 31, 1946. Thereafter vessels were to be chartered from the Maritime Commission under a new form of charter (Shipsalesdemise Form 303) which would contain a profit-sharing clause providing for the payment to the Commission, on a final basis, of so-called "additional charter hire" on a sliding scale reaching as high as 90% of the cumulative net profit in excess of 10% per annum on capital necessarily employed (R. 19-20). This rate was in excess of the rate specified by Section 709(a) of the Merchant Marine Act, 1936 (46 U.S.C. 1199(a)),[2] of *one-half* of the cumulative net profit in excess of 10% per annum on capital necessarily employed (R. 19-20).

Respondent and others similarly situated objected to paying the proposed additional charter hire on the sliding scale rate on the ground that it was illegal (R. 20). By way of compromise, the Commission, on the recommendation of its General Counsel, inserted in the proposed charter agreement a provision whereby the charterer agreed to make *preliminary* (rather than final) payments on account of additional charter hire under the new charter (Shipsalesdemise Form 303) and to make preliminary payments on account of additional charter hire that had accrued under the cancelled charter (Warshipdemiscout Form 203), as called for by the Commission, and whereby the Commission agreed to refund excessive preliminary payments of any additional charter hire made under each charter upon its final audit of the results of operations under such charter (R. 20). The proposed charter

[2] Section 5(e) of the Merchant Ship Sales Act (50 U.S.C. App. 1738(e)) provides that Section 709 of the Merchant Marine Act, 1936 "shall be applicable to charters made under this section."

agreement was accordingly modified by adding the following paragraph to Clause 13:

> "The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISE-OUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISE-OUT charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required." (R. 20).

Respondent and others similarly situated executed the charter agreement (Shipsalesdemise Form 303) with this modification included (R. 20) and, the Maritime Commission and its successor, the Maritime Administration, reaffirmed by regulations, instructions and supplemental agreements its agreement in Clause 13 to refund to the charterer upon final audit any preliminary payments the charterer made in excess of the additional charter hire that the Maritime Administration was lawfully entitled to retain.[3] In accordance with the agreement in Clause 13, and these regulations, instructions and supplemental agreements, respondent made, among others, a preliminary payment of $327,-

[3] Some, but not all, of these regulations and instructions are referred to in the in banc decision of the court below. (R. 121; see also R. 5-7).

730.16 on September 21, 1951 and a further preliminary payment of $3,104.08 on September 21, 1953. These preliminary payments were made on account of additional charter hire under both the War Shipping Administration Form 203 charter and the Maritime Commission Form 303 charter. In accordance with instructions from the Maritime Administration,[4] the principal preliminary payment was accompanied by a letter of transmittal stating:

> "This remittance is subject to adjustment upon the completion of final accounting between the American Foreign Steamship Corporation and the Maritime Administration and neither the tender of such payment by the American Foreign Steamship Corporation, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise." (R. 18-19)

The Maritime Administration was required by law to deposit all funds it received into the general funds of the Treasury, "miscellaneous receipts."[5] The Maritime Administration did not, however, deposit the preliminary payments into the general funds of the Treasury but held them in a special unearned moneys account with the approval of the Comptroller General, because they "did not represent 'earned' moneys when first received" 33 Dec. Comp. Gen. 503, 504 (1954). *Cf. Rosenman* v. *United States*, 323 U.S. 658, 662.

[4] These instructions are set out in a footnote to the in banc decision of the court below. (R. 121)

[5] Section 12(d) of the Merchant Ship Sales Act provides:

> "All moneys received by the Commission under this Act shall be deposited in the Treasury to the credit of miscellaneous receipts . . ." (50 U.S.C. App. 1745(d))

On October 21, 1954, respondent filed its final accounting of the results of its operations under each of the two charters and demanded that the excess preliminary payments be refunded to it on final audit of its accounts in accordance with the said provisions of Clause 13 (R. 7-8; 9-15). On November 3, 1954, Maritime refused to return such overpayments on final audit in accordance with its agreement in Clause 13 (R. 8), and, on November 24, 1954 (Cert. R. 1a),[6] suit was filed for the return of such overpayments in accordance with the said agreement. This suit, therefore, is for breach of contract.[7]

[6] This reference and other references designated "Cert. R." are to those parts of the certified record filed herein which were not printed. In designating the record for printing, both sides stated that the parties may refer in their briefs or oral argument to any portions of the certified record filed in this Court which were not included in the printed record.

[7] The Government errs in its assertion that "these libels for allegedly illegal assessment of additional charter hire were characterized as actions for unjust enrichment in this Court's decision in *Sword Line, Inc.* v. *United States*, 351 U.S. 976." (Govt. Brief, 6, fn. 5)

Since *these libels* were not before this Court in *Sword Line*, they were not characterized in any way by this Court in that case.

Moreover, libelant's claim in *Sword Line* differed materially from respondent's claim here. If libelant in *Sword Line* had a claim for breach of contract, it did not assert that claim. On the contrary, it informed the Court of Appeals that

> "the instant suit is founded upon a statute and not upon a contract, maritime or non-maritime." (Petition for Rehearing, *Sword Line, Inc.* v. *United States*, No. 23723, in the Court of Appeals for the Second Circuit, at p. 3)
>
> "The implied obligation to repay, under the theory of money had and received or any other theory, rests upon the statute." (*Ibid.*, at p. 9)

Nor did Sword Line raise in this Court the question of whether it had a claim for breach of contract. In its Petition for Certiorari

2. The proceedings below

The Government, appearing specially, excepted to the amended libel on the ground that

> "This [District] Court lacks jurisdiction over the subject matter of this suit and over the re-

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(No. 861, October Term, 1955), Sword Line sought review of two questions which are material to this discussion. These questions expressly negated any claim for breach of contract. They were:

> "1. Can a court of admiralty have jurisdiction over a claim for money unconscionably retained in violation of the provisions of an Act of Congress, although not in violation of a maritime contract.
>
> "2. Does admiralty have jurisdiction over a suit in quasi contract for money had and received when there is an express maritime contract, but no breach thereof." (pp. 2-3)

Further, in the body of its Petition, it assured this Court:

> "In the case at bar there was an express contract between Sword Line, Inc. and the United States but there was no breach of that contract." (p. 16)

The Government urged the granting of the writ of certiorari to review these questions, stating that

> "The scope of quasi-contractual jurisdiction in admiralty appears in recent years to have given rise to extensive difficulties and misunderstandings." (Memorandum for the United States in No. 861, October Term, 1955, at p. 2)

This Court granted the writ and held *per curiam:*

> "Certiorari is granted limited to the question whether admiralty had jurisdiction over the controversy stated in the libel, and the judgment is affirmed. The libel, though dependent on a statute, alleges unjust enrichment from a maritime contract." (351 U.S. 976)

In *Webster* v. *Fall*, 266 U.S. 507, 511, this Court said:

> "Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon are not to be considered as having been so decided as to constitute precedents."

Here the Government urges that a question which was negated in the questions presented to this Court on certiorari and which both parties expressly assured the Court did not "lurk in the record" was so decided as to constitute a binding precedent.

> spondent for the reason that this suit was not commenced within two years after the cause of action alleged in the libel arose, as required under Section 5 of the Suits in Admiralty Act, 46 U.S.C. 745." (R. 17)

and moved the exception for hearing (R. 63).

The exception was sustained and the libel dismissed on authority of *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, aff'd on rehearing, 230 F. 2d 75, aff'd *per curiam* as to admiralty jurisdiction, 351 U.S. 976, and *American Eastern Corp.* v. *United States*, 133 F. Supp. 11, aff'd, 231 F. 2d 664. District Judge Palmieri said:

> "The impact of these decisions is that the causes of action, if any, accruing to the libelants with respect to any payments made to the Maritime Commission arose upon redelivery of the vessels. The position consistently taken by the Government in these cases and justified by the authorities, has been that any payments made after redelivery of the vessels (the charters being thereby terminated) must be deemed to have been made voluntarily regardless of any accompanying protests." (R. 64)

The last of the chartered vessels had been redelivered on December 28, 1949 (R. 3). The preliminary payments were made on September 21, 1951 and September 21, 1953 (R. 18-19). The District Court therefore held that it lacked jurisdiction and dismissed the amended libel because it found that the payments were voluntarily made, an issue which was not before the court on the Government's motion, which respondent did not know the court was entertaining, and concerning which it was given no opportunity "to secure and present evidence." *Cf. Washington ex rel. Ore R. & N. Co.* v. *Fairchild*, 224 U.S. 510, 524-25, and *Morgan* v. *United States*, 304 U.S. 1, 18-19.

On appeal, a three judge panel of the Court of Appeals consisting of Circuit Judges Medina and Hincks, and District Judge Leibell, affirmed on authority of *Sword Line* and *American Eastern*, although the court in an opinion written by Judge Hincks, expressed doubts as to the correctness of those decisions. It said:

> "If the subject matter of these appeals were *res nova*, we are by no means sure that our dispositions would coincide with those made by the majority opinion in *Sword Line* and by *American Eastern*. However, we will not overrule these recent decisions of other panels of the court. On the authority of *Sword Line* and *American Eastern* we hold that these libels also were barred." (R. 112)

Rehearing in banc was granted on December 19, 1957. On rehearing the Government contended *for the first time* that "final audit" in Clause 13 was used in the sense of "annual audit," claiming that the word "each" appearing before the words "final audit" in one place in the clause showed that more than one "final audit" was contemplated (R. 123-124).

Respondent and other appellants pointed out that Clause 13 required a charterer to make preliminary payment on account of additional charter hire not only on vessels operating under Maritime Administration Shipsalesdemise Form 303 but also

> "on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner."

Clause 13 provided that payments under *both* charters were deemed to be preliminary and subject to adjustment "upon the completion of *each* final audit." The words "each final audit" therefore plainly referred to the final audit of operations under each of the two charters (Cert. R. 395a-97a). It was pointed out to the court that this was the practical construction of Clause 13 by the parties[8] and that the Government had contended, twenty-two days before submitting its brief on rehearing in the court below, in the United States District Court for the District of Delaware, that a single final audit of all operations under the charter and not an annual audit was intended by Clause 13 (Cert. R. 344a-46a).

The majority of the court (Judges Hincks, Medina and Moore) in an opinion again written by Judge Hincks, held that inasmuch as the preliminary payments on account of additional charter hire were made pursuant to the charter agreement and specifically Clause 13 thereof, the rights of the parties depended upon that clause; that Clause 13 provided for the refund of overpayments upon the completion of final audit; and that consequently libelant's cause of action arose at that time. As to the Government's contention that the words "final audit" were intended to

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[8] This Court has several times held that the interpretation of a statute by Government representatives responsible for its administration is entitled to great, if not controlling, weight (*Fawcus Machine Co.* v. *United States*, 282 U.S. 372, 378; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315; *Bowles* v *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14) and the Court of Claims has applied this principle to the interpretation of contracts by Government representatives responsible for their administration. See *Central Engineering and Construction Co.* v. *United States*, 103 C. Cls. 440, 465 (1945); *Houston Ready-Cut House Co.* v. *United States*, 119 C. Cls. 120, 187-88 (1951).

mean "annual audit", the court thought that the language of the clause *prima facie* supported libelant's view. However, since the issue had not been raised in the District Court and since it apparently depended upon facts "alleged in briefs and affidavits," some but not all of which were part of the record in the District Court, the cases were remanded and the issue "submitted to the trial judges for findings and determination after giving the Government an opportunity to raise such issues of fact as may be desired" (R. 124).[9]

The court concluded that "all [claims] were reserved by Clause 13 until 'final audit' whatever that term shall be determined to mean" (R. 125), and said that insofar as *Sword Line* and *American Eastern* were inconsistent with its decision, they were overruled. The court did not pass upon the Government's contention that the preliminary payments were voluntary payments because the court said this was an "issue going to the merits" and not germane to the question of jurisdiction (R. 122). *Cf. Binderup* v. *Pathe Exchange*, 263 U.S. 291, 304-05.

Chief Judge Clark and Judge Waterman dissented in separate opinions. Both judges said that the court should not have overruled the *Sword Line* and *American Eastern* decisions. Judge Clark, in a separate opinion in which Judge Waterman concurred, added that the Government's contention that "final audit"

[9] The Government has apparently abandoned the contention made in its brief on rehearing in the court below that "final audit" was used in Clause 13 in the sense of "annual audit." Its answer, filed in the District Court on August 25, 1959, one year after the in banc decision of the court below, does not allege that the words "final audit" in Clause 13 were intended to mean "annual audit".

meant "annual audit" should have been accepted "without fairly conclusive support" for the libelant's interpretation of those words; and that the remand was improper because he assumed that all evidence on this point had already been submitted to the District Court. He said:

> "It is, indeed, a reflection upon able and shrewd counsel [for the libelants] to believe that, faced with the legal requirement and practical necessity of disclosure they should have held back relevant and convincing material." (R. 129)

Judge Clark overlooked the fact that the Government raised this issue for the first time on rehearing in the Court of Appeals and that, as the majority pointed out, the parties had no occasion to present evidence thereon before that time. (R. 123-124)

Judge Clark also raised the question now before the Court in this case. Although he regarded the continued participation of retired judges "in cases committed to their consideration desirable and beneficial all around" (R. 135), Judge Clark expressed doubt as to the authority of Judge Medina under 28 U.S.C. 46(c) to participate in the court's in banc decision after his retirement from regular active service. The Government petitioned for further rehearing in banc principally on this ground. The petition was denied, the court dividing as it had in deciding the case on rehearing in banc.

The majority held that there was nothing in the 1948 Judicial Code which prevented Judge Medina, who was a member of the duly constituted court in banc, from participating after retirement in its decision. The court said:

"Nothing in the Code requires that the court of appeals, when once constituted according to law, whether *in banc* or by assignment as an authorized division, shall suspend its judicial task and reconstitute itself either to exclude an active member of the court thereafter retiring or to include an active member of the court thereafter appointed." (R. 138)

The court also pointed out:

"Moreover, § 43(b) of the Code of 1948 provides: 'Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court.' This provision is not stated to be exclusive of the 'judges designated or assigned' to hear and determine a case as members of a court *in banc*. The provision is as applicable to such judges as it is to judges designated and assigned to the divisions of the court provided for in § 46(b) and to judges designated and assigned under §§ 294 and 296. The provision thus lends further support to our conclusion that Judge Medina, who under § 46(c) was designated and assigned as a member of the court *in banc* was competent even after his retirement to sit under §§ 43(b), 294(b) and 296." (R. 139)

In a separate statement Judges Clark and Waterman dissented from the view expressed by the majority, although they expressed "doubt as to the ultimate wisdom of the policy" of excluding retired judges from participating in decisions of such cases which they felt compelled to advocate under their interpretation of Section 46(c). (R. 140)

3. The petitions for writs of certiorari

On June 23, 1959, the Government filed its petition in No. 138 for a writ of certiorari limited to the question of whether Judge Medina was disqualified by 28

U.S.C. 46(c) from participating in the in banc decision of the court below. Respondent opposed the issuance of the writ, and filed a conditional cross-petition presenting the substantive issues in No. 322.

On October 19, 1959, the Court granted the Government's petition for a writ of certiorari. (R. 142) The Court has taken no action with regard to respondent's conditional cross-petition presenting the substantive issues in No. 322.

SUMMARY OF ARGUMENT

The decision of the court below is valid because:

1. Section 46(c) does not, as the Government claims, provide that cases in banc must be heard and determined by active circuit judges of the circuit. The purpose of Section 46 is to empower a court of appeals to convene itself into divisions, three-judge courts or in banc and to distribute its work among its members in the courts so convened (*Western Pacific Railroad Case*, 345 U.S. 256, 257-58). The requirement that an in banc court "shall consist of all active circuit judges of the circuit" plainly refers to the constitution of the court at the time it is convened.[10] There is nothing in the section that prohibits judges from participating in decisions of cases which were committed to their consideration as members of a court in banc before they retired.

Courts of appeals in every circuit in which judges have retired under the present Judicial Code have per-

[10] We do not mean to imply that a court of appeals may not add to a court in banc at the time it is convened other justices or judges competent to sit as judges of the court. This question, however, is not involved in this case, since Judge Medina, when assigned to the court in banc, was an active circuit judge of the circuit.

mitted them to participate in decisions of cases which they heard prior to the time they retired either as a member of a three-judge court or, when the question has arisen, as a member of a court in banc. Similarly, so far as we have been able to ascertain, every court that has considered the matter has permitted a judge, whose term of office has ended under the peremptory terms of a jurisdictional statute, to participate thereafter in the determination of cases which he heard during his term of office. This practice is based upon the assumption that a legislature, in regulating the jurisdiction of a court, does not intend capriciously to interfere with its orderly and effective administration by requiring the court to pause in its consideration of a submitted case in order to reconstitute itself either to omit a former member or to add a member newly appointed. *Shore* v. *Splain*, 258 Fed. 150 (C.A.D.C.); *Cf. Textile Mills Sec. Corp.* v. *Commissioner*, 314 U.S. 326.

2. The Government's argument that this practice should not be applied in this case does not bear analysis. The Government says that the "express provisions" and underlying policy of Section 46(c) preclude Judge Medina's participation in the in banc decision after he retired. (Govt. Brief, 10) The "express provisions" of Section 46(c) do not preclude his participation therein; nor does its underlying policy.

The Government says that the testimony in hearings in 1941 before a subcommittee of the Senate Committee on the Judiciary, hereinafter called the "Senate Subcommittee Hearings" (Govt. Brief, 18-19), and a supposed statutory prohibition against the consideration by retired circuit judges or district judges of

petitions for rehearing in banc from panel decisions in which they participated (Govt. Brief, 12, 17, 23), show a Congressional purpose to exclude such judges from participation in in banc proceedings.

If such a purpose existed, it would not, of course, extend to prohibiting a retired circuit judge from participating in the decision of a case which had been committed to his consideration as a member of an in banc court before he retired. (See 1, above.) There is, however, no such Congressional purpose.

The Senate Subcommittee Hearings show that it was contemplated that a court of appeals might call district judges to sit with the court in banc under suitable circumstances. This Court held, in the *Western Pacific Railroad Case*, 345 U.S., at 263, 267-68, that a court of appeals could assign *the entire function* of initiating a rehearing in banc to the panel, consisting of two district judges and one circuit judge, which had originally heard the case. Moreover, the rationale of *Textile Mills Sec. Corp.* v. *Commissioner*, 314 U.S. 326,—that judges competent to sit as judges of a court of appeals were competent to sit with the court in banc—was consciously affirmed in Section 43(b) of the present Judicial Code when Congress made *all* justices and judges designated or assigned to a court of appeals competent, without qualification, "to sit as judges of the court." See Reviser's Note to Section 43(b) (28 U.S.C.A. §43(b), note).

The court below, therefore, was plainly right when it said that Section 43(b) supported its conclusion "that Judge Medina, who under § 46(c) was designated and assigned as a member of the court *in banc* was competent even after his retirement to sit under §§ 43(b), 294(b) and 296." (R. 139)

3. If Judge Medina's participation in the in banc decision was not authorized by law, he was a *de facto* judge whose judicial acts were as valid and as binding upon litigants as those of a *de jure* judge. *Ex Parte Ward*, 173 U.S. 452; *Ball* v. *United States*, 140 U.S. 118; *Manning* v. *Weeks*, 139 U.S. 504. His status cannot be brought into question by the Government in its simulated role of private litigant, but only by the Government as *sovereign* in an action in the nature of *quo warranto* to restrain Judge Medina from asserting the judicial authority which the Government now claims he lacks. *Johnson* v. *Manhattan R. Co.*, 289 U.S. 479, 502. This principle is the more insistent in this case because his retired status did not affect the Government's right to a fair, orderly, or convenient hearing of the appeal. *Cf. American Construction Co.* v. *Jacksonville T. & K. W. R. Co.*, 148 U.S. 372; *Johnson* v. *Manhattan R. Co.*, 289 U.S. 479; *Frad* v. *Kelly*, 302 U.S. 312.

ARGUMENT

I. JUDGE MEDINA WAS COMPETENT UNDER THE TERMS OF THE STATUTE TO PARTICIPATE IN THE DECISION OF THE COURT BELOW BECAUSE HE WAS A MEMBER OF THE COURT WHEN THE CASE WAS COMMITTED TO ITS CONSIDERATION

Section 46(c) does not, as the Government contends (Govt. Brief, 10-14), provide that cases in banc must be heard and determined by active circuit judges of the circuit.

Section 46 provides in material part:

> "(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.
>
> "(b) In each circuit the court may authorize the hearing and determination of cases and con-

troversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

This section authorizes a court of appeals, i.e., the active circuit judges of the circuit,[1] to convene itself into divisions, three-judge courts, or in banc, and to distribute its work among its members in the courts so convened.

This Court explained:

"In this Section, Congress speaks to the Courts of Appeals: the court, itself, as a body, is authorized to arrange its calendar and distribute its work among its membership; the court, itself, as a body, may designate the places where it will sit. Ordinarily, added Congress, cases are to be heard by divisions of three. But Congress went further; it left no doubt that the court, by a majority vote, could convene itself en banc to hear or rehear particular cases." (*Western Pacific Railroad Case*, 345 U.S. 256, 257-58)

This section refers to the times the courts are convened, the judges are assigned and the work is distributed. The requirement that a court in banc "con-

[1] 28 U.S.C. 43(b) provides in pertinent part:

"Each court of appeals shall consist of the circuit judges of the circuit in active service."

sists of all active judges of the circuit" refers to the constitution of the Court at the time it is convened.[12]

There is nothing in the statute which suggests that a member of an in banc court who has participated in the court's consideration of a case is divested of judicial competency to participate in its decision because he retires from regular active service before that decision is reached.[13] There is nothing in the statute which suggests that an active member of the court who is appointed after a case has been committed to the court's consideration must participate in its decision. This was the view of the court below. It said:

> "Since Judge Medina was a member of the court *in banc* which was duly constituted to hear and determine the issues raised by the petition for rehearing, we think his subsequent retirement did not affect his competence to participate in the decision thereafter reached. Nothing in the Code requires that the court of appeals when once con-

[12] We do not mean to imply that a court of appeals may not add to a court in banc at the time it is convened other justices or judges competent to sit as judges of the court. See pp. 33-37, *infra*. This question, however, is not involved in this case, since Judge Medina, when assigned to the court in banc, was an active circuit judge of the circuit.

[13] On pages 12-13 of its brief, the Government implies that Judge Medina's retirement on March 1, 1958 occurred after the petition for rehearing in banc had been acted upon, "but prior to the hearing or determination on the merits." This implication that he retired *prior to the hearing* is doubtless an inadvertence. On March 1, 1958, when Judge Medina retired, the case on rehearing had already been committed to the consideration of the court under the terms of the order granting rehearing in banc. (R. 114) As the Government points out on page 9 of its brief, the question before this Court is whether circuit judges "who, like Medina here, retire subsequent to *en banc* hearing but prior to *en banc* determination" may participate in in banc decisions.

stituted according to law, whether *in banc* or by assignment as an authorized division, shall suspend its judicial task and reconstitute itself either to exclude an active member of the court thereafter retiring or to include an active member of the court thereafter appointed." (R. 138)[14]

This is also the view of all other courts of appeals before which similar questions have arisen in in banc cases. It conforms to the practice of courts of all circuits in three-judge court cases and to the practice of all courts under various jurisdictional statutes.

A. In Banc Cases

The only other cases involving the question presented in this case arose in the Ninth Circuit. Questions identical in principle arose in two cases in the Fifth Circuit and one case in the Third Circuit.

The Ninth Circuit cases are *Herzog* v. *United States*, 235 F. 2d 664, 670, fn., cert. denied, 352 U.S. 844, and *In Re Sawyer*, 260 F. 2d 189, 203, fn. 17, rev'd on other grounds, 360 U.S. 622. In both of these cases the Ninth Circuit conformed to the views of the court below.

In *Herzog* v. *United States, supra*, the status of Judges Bone and Orr was precisely the same as that of Judge Medina in this case. As members of the court in banc, they heard argument in the case, there-

[14] The dissenting judges in the court below recognized the importance to effective judicial administration of the principle pronounced by the majority. They said they regarded the continued participation of retired judges "in cases committed to their consideration desirable and beneficial all around", and expressed their "doubt as to the ultimate wisdom of the policy" of excluding retired judges who had heard in banc cases from participation in the decisions of such cases, which they thought Section 44(c) required them to advocate. (R. 135, 140)

after retired from regular active service, and subsequently participated in the court's in banc decision. (235 F. 2d at 670, fn.)

In *In Re Sawyer,* Judge Denman, after he had heard argument in the case as a member of the court in banc, retired and was succeeded by Judge Hamlin before a decision in the case was reached.[15] The court did not suspend its judicial task either to exclude Judge Denman or to include Judge Hamlin. It is true that Judge Denman did not participate in the in banc decision. The court carefully explained, however, that this was because he thought it "inappropriate" to do so. (260 F. 2d, at 203, fn. 17.) The explanation lacked point unless the court assumed that retired Judge Denman was competent to participate in its in banc decision if he had chosen to do so.

The Fifth Circuit cases are *Commercial Nat. Bank in Shreveport* v. *Connolly,* 176 F. 2d 1004, petition for rehearing in banc denied, 177 F. 2d 514, and *United States* v. *Sentinel Fire Ins. Co.,* 178 F. 2d 217, petition for rehearing in banc denied, 178 F. 2d 239. At the time these cases arose there were six active circuit judges in the Fifth Circuit. One of them, Judge Lee, did not participate in either case. (177 F. 2d, at 515; 178 F. 2d, at 219.) The cases were heard and decided in banc by Judge Sibley and the other four active circuit judges. Subsequently Judge Lee died and Judge Sibley retired. Judges Russell and Borah were appointed to succeed them. Thereafter, petitions

[15] Judge Denman retired July 3, 1957, and Judge Hamlin took the judicial oath on April 16, 1958 (Legislative History of the United States Circuit Courts of Appeals, Senate Committee on the Judiciary, 85th Cong., 2d Sess., at p. 141.) *In Re Sawyer* was decided June 9, 1958 (260 F. 2d 189).

for rehearing in banc were filed in both cases. In conformity with the views of the court below, the Fifth Circuit Court of Appeals did not in either case "reconstitute itself either to exclude" Judge Sibley, who had retired, "or to include" Judges Russell and Borah, who had been appointed. The petitions for rehearing in banc were denied *per curiam* by the court consisting of retired Judge Sibley and the four other judges who had constituted the court in banc on the original hearing with two of these judges dissenting. (177 F. 2d at 514; 178 F. 2d at 239.)

The Third Circuit case is *Bishop* v. *Bishop*, 257 F. 2d 495. There Judge Magruder, then an active circuit judge of the First Circuit, sat by designation in the Third Circuit and participated in an in banc decision denying rehearing in banc.[16] The case supports the decision of the court below.

B. Three-Judge Cases

In ten of the eleven circuits judges have retired since the enactment of the present Judicial Code. In each of these circuits those judges have been permitted to participate in the decision of the cases committed

[16] The Government says that Judge Magruder participated only in a denial of a rehearing by the panel. (Govt. Brief, 19, Fn. 17) The report of the case shows that it was an in banc decision *per curiam* "before BIGGS, Chief Judge, and MARIS, MAGRUDER and STALEY, and HASTIE, Circuit Judges" (257 F. 2d, at 501). More than three judges cannot sit on a Court of Appeals except in banc (28 U.S.C. 46(c)). Five judges, of course, constituted a quorum (28 U.S.C. 46(d)) of the in banc court in the third circuit since that court is composed of seven active circuit judges (28 U.S.C. 44(a)). Moreover, Chief Judge Biggs and Judge Hastie, who dissented were not members of the panel which originally heard the case (257 F. 2d 496). Judges do not dissent from decisions of panel courts to which they are not assigned.

to their consideration as members of three-judge courts before they retired.[17]

28 U.S.C. 294(e) provides that "No retired justice or judge shall perform judicial duties except when designated and assigned." The participation of retired circuit judges in the decision of cases they heard prior to their retirement, like the participation of former judges in decisions of cases they heard during their term of office, does not depend upon any subsequent grant of judicial authority.

Judge Medina participated after his retirement in decisions of at least 36 such cases (in 20 of which the Government was a party), without any designation or assignment after he retired. Judge Magruder similarly participated in at least 18 decisions of such cases without any designation or assignment after he retired.[18]

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[17] Cases in the ten circuits are collected in the Appendix, *infra*, p. 50.

[18] Judge Medina retired on March 1, 1958. On July 28, 1958, the date of the in banc decision of the court below, he had not been designated or assigned to perform any judicial duties. Between March 1, 1958 and July 28, 1958, he participated in at least 36 decisions of cases he had heard before March 1, 1958. These cases are listed in the Appendix, *infra*, pp. 51-52.

Judge Magruder retired on June 12, 1959. On November 5, 1959 he had not been designated or assigned to perform any judicial duties. (See *Goldfine et al.* v. *United States*, No. 396, this Term, Reply Brief by Petitioners to Brief for the United States in Opposition to Petition for a Writ of Certiorari, p. 8, fn. 1.) Between June 12, 1959 and November 5, 1959, he participated in at least 18 decisions of cases he had heard before June 12, 1959. These cases are listed in the Appendix, *infra*, pp. 53-54.

The Government in its Petition for Further Rehearing En Banc in the court below, explained this practice:

> "Having retired, Judge Medina of course still remained a circuit judge. *Booth* v. *United States*, 291 U.S. 339 (1934); *United States* v. *Moore*, 101 F. 2d 56 (2d Cir. 1939), cert. denied 306 U.S. 664 (1939), 28 U.S.C. 371 (b). He remained fully competent to sit as one of three judges in the ordinary case, 28 U.S.C. 43(b), 294(b). By virtue of his assignment before his retirement for the original hearing and determination of ordinary cases by a division of the Court of Appeals, he continued assigned and competent to participate in the divisional decision of those cases after retirement." (Cert. R. 521)

In this Court, the Government has apparently changed its views. It argued in its Petition for Certiorari (pp. 10-11) and suggests in its Brief (pp. 23, 26-28) that a retired circuit judge, in order to participate in the decision of a case he heard as a member of a court of appeals before he retired, must receive a designation or assignment from the Chief Judge of the court after he retires, and that, in the absence of such a designation or assignment, the decision in which he participated is void.

Adopting the Government's argument in its Petition for Certiorari in this case, Petitioners in *Goldfine & Paperman* v. *United States*, No. 396, this Term, now ask this Court to reverse the affirmation of their conviction by the Court of Appeals for the First Circuit. They point out that the *Goldfine* case was argued on May 13, 1959 and decided on July 24, 1959, with an opinion by Judge Magruder, who had retired from

the court on June 12, 1959 and had received no designation or assignment thereafter.[19]

The Government's present position and that of Petitioners in the *Goldfine* case cannot be sustained. It would overrule the practice of all of the courts in all circuits and probably invalidate hundreds of past decisions.

When an appellate judge has heard cases and consulted with his colleagues on the issues involved in those cases and thereafter retires, his right to participate in the decision of each of such cases cannot be made to depend on the approval of one of his colleagues. A judge must perform his judicial duties as a matter of right, not of grace.

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[19] *Goldfine et al.* v. *United States*, Reply Brief, pp. 8-12. Petitioners in the *Goldfine* case, argue:

> "In his petition in *American-Foreign Steamship Corp. et al., supra*, the Solicitor General himself acknowledges that a formal designation under 28 U.S.C. § 296 is required to authorize a retired judge to sit. The Solicitor General represents to this Court as follows (Pet. for Cert., pp. 10-11):
>
> > 'Moreover, the powers conferred on retired judges under 28 U.S.C. 296 are solely those conferred by the Chief Judge of the circuit. Following his retirement, Judge Medina did not receive a designation and assignment in this case. Plainly, Chief Judge Clark did not purport in any way to invest Judge Medina with the power to participate in the *en banc* decision.'
>
> "The Solicitor General also maintains (and we believe correctly) that 'The issue is one of statutory interpretation; it is not a matter of discretion.' (Pet. for Cert., p. 7, *United States* v. *American-Foreign Steamship Corp., et al.*) The foregoing contentions by the Solicitor General apply precisely to the present case.
>
> "We submit that the judgment by the Court of Appeals is void because rendered by an improperly constituted court, that certiorari should be granted, and the judgment should be reversed." (*Ibid.*, pp. 11-12)

C. Cases Arising Under Other Jurisdictional Statutes

Judges, whose authority has ended under jurisdictional statutes, are always permitted to participate in deciding cases they heard while they had judicial authority.

In *Shore* v. *Splain*, 258 Fed. 150, the Court of Appeals of the District of Columbia, after examining several state jurisdictional statutes similar to its own, pointed to its own practice and said:

> "In the event of a vacancy in this court on account of the absence of one of its members, the remaining members are authorized to designate a justice of the Supreme Court of the district to sit in his place 'while such vacancy * * * shall exist.' Code § 225. Between the submission of a case and its final disposition weeks may intervene, and if during that period the justice whose place the additional justice had taken must remain away from the court, although ready to act, it would greatly impede the dispatch of the public business here. Ever since the organization of the court it has been the practice for the additional justice to participate in the opinions and judgments in cases argued before the court while he was on the bench, although the regular justice whose place he had been appointed to fill had returned to his duties before the judgments were announced. *The right of the additional justice to do so has never been questioned by any one so far as we know.*" (258 Fed., at 153; emphasis supplied.)

Although the language of the jurisdictional statutes under which the judge's authority to act is terminated is typically mandatory,[20] courts imply an exception

[20] Examples of such statutes are: A temporary judge may sit "until such disability be removed or vacancy filled" and "while such vacancy . . . shall exist" (*Shore* v. *Splain*, 258 Fed., at 152-53) "such appointment [of a temporary judge] shall not continue for a longer period than the absence or disability of the police judge". (*Smith* v. *Sullivan*, 33 Wash. 30, 34, 73 Pac. 793 (1903). Cases involving similar statutes are collected in *Shore* v. *Splain*, 258 Fed., at 152-53.

as to pending cases.[21] They refuse to impute to the legislature, in regulating the jurisdiction of courts, a capricious intention to interfere with their effective and orderly administration by requiring courts to suspend their deliberations in cases committed to their consideration, either to exclude a member whose term of office has expired or to include one newly appointed.[22]

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[21] *Shore* v. *Splain*, 258 Fed. 150 and cases cited therein; *State ex rel. Jugler* v. *Gover*, 102 Utah 459, 132 P. 2d 125 (1942); see also *United States ex rel. Paetau* v. *Watkins*, 164 F. 2d 457, 459-60 fn. 1 (2d Cir.); *Cheesman* v. *Hart*, 42 Fed. 98, 105-6 (Cir. Ct. Colo.); *Sunrise Mayonnaise, Inc.* v. *Swift & Co.*, 88 F. Supp. 187, 188-89 (E.D. Pa.); *Johnson* v. *Bussey*, 95 S.W. 2d 990 (Tex. Civ. App. 1936); *Peterson* v. *Finnegan*, 45 N.D. 101, 176 N.W. 734 (1920); *State ex rel. Hodshire* v. *Bingham*, 218 Ind. 490, 33 N.E. 2d 771 (1941). This principle, of course, does not apply to the determination of *new matters* which arise out of a case after it has been decided. See *Frad* v. *Kelly*, 302 U.S. 312, 317.

[22] In *United States* v. *Kirby*, 7 Wall. 482, 486-87, this Court said:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases should prevail over its letter."

This principle has been reiterated in a series of cases. See *Heydenfeldt* v. *Daney Gold & Silver Min. Co.*, 93 U.S. 634, 638; *Church of The Holy Trinity* v. *United States*, 143 U.S. 457; *Lau Ow Bew* v. *United States*, 144 U.S. 47, 59; *Bird* v. *United States*, 187 U.S. 118, 124; *Hawaii* v. *Mankichi*, 190 U.S. 197, 212-15. It was applied by this Court to the construction of the former Judicial Code in *Textile Mills Sec. Corp.* v. *United States*, 314 U.S., at 334. Citing *Hawaii* v. *Mankichi*, the *Lau Ow Bew* and *Bird* cases, the court in *Shore* v. *Splain* applied this same principle to its refusal to construe a jurisdictional statute under which a judge's authority had ended to preclude him from deciding cases committed to his consideration during his term of office. (258 Fed., at 152)

II. THE UNDERLYING POLICY OF 28 U.S.C. 46(c) DOES NOT, AS THE GOVERNMENT CONTENDS, PRECLUDE JUDGE MEDINA'S PARTICIPATION IN THE IN BANC DECISION OF THE COURT BELOW

The Government's conclusion that the underlying policy of Section 46(c) precludes Judge Medina's participation in the decision (Govt. Brief, 15-20) is without foundation.

The Government bases this conclusion upon a supposed Congressional purpose to exclude judges, other than active circuit judges of the circuit, from all in banc proceedings which it alleges is indicated in the Senate Subcommittee Hearings (Govt. Brief, 19); and upon a supposed statutory prohibition against the consideration by retired circuit judges and district judges of petitions for rehearing in banc from panel decisions in which they participated (Govt. Brief, 12, 17, 23).

If such a Congressional purpose did exist, it would not apply to preclude a retired circuit judge from participating in the decision of a case which had been submitted to his consideration as a member of a court in banc before he retired. (See pp. 18-28, *supra*.) There is, however, no such Congressional purpose.

A. The Senate Subcommittee Hearings

The Senate Subcommittee Hearings do not indicate such a purpose. They are, of course, hearings on a bill which did not become law. To the extent that they indicate the purpose of Congress seven years later when it included Section 46(c) in the 1948 Revision of the Judicial Code, they show that the purpose was not to exclude judges, other than active circuit judges of the circuit, from an in banc court, but to assure that *all* active-circuit judges of the circuit would be included in such a court. Throughout the hearings,

the desirability of permitting the court to call in district judges to sit on the court in banc was recognized both by the judges who testified and by the Senators before whom they testified.

In those hearings the question arose in connection with the desirability of avoiding an evenly divided court in cases heard in banc in circuits which had an even number of judges. The following testimony is pertinent:

> "Mr. Chandler [representing the Administrative Office of the U. S. Courts]. I would like to say for the information of Judge Parker and Chief Justice Groner, if I may, that question was raised at the meeting last Monday, and it was also raised in an inquiry to me from the Bureau of the Budget, and I answered the Bureau of the Budget, and I made the same statement here, that recognizing that if the circuit court of appeals consisted of an even number of judges the result might be that if all the judges sat there would be an even division and no majority, yet the judgment of the Judicial Conference seemed to be pretty clear that if the court was constituted of more than three judges it should be constituted of all the active and available judges. While the conference had not considered this particular matter, I thought it would be contrary to their view that an even division should be avoided by selecting some number of the court less than all if more than three merely in order to get an odd number; that is, if a majority was obtained by eliminating in good faith one judge from participating in the decision, then I thought one of the purposes of this bill would be lost.
>
> "Judge Parker. Unless there is something in the bill which forbids it, I think it would be perfectly feasible for the judges to call in a district judge to sit in the court, in the hearing in that case.

"Senator Kilgore. Why should not it be made a provision of the bill?

"Judge Parker. I am inclined to think it should be." [23]

The testimony of Mr. Chandler was, as he said, a repetition in substance of testimony he had given before the Subcommittee a few days before. At that time, Senator McFarland suggested that provision be made to permit the court to call in a district judge to sit with it in banc (Hearings, at pp. 14-15).

B. The Supposed Statutory Prohibition

There is no statutory prohibition against the consideration by retired circuit judges or district judges of petitions for rehearings in banc from panel decisions in which they participated. In the *Western Pacific Railroad Case,* this Court held that a court of appeals, that is, the active circuit judges of the cir-

[23] Hearings before a Subcommittee of the Senate Committee on the Judiciary, on S. 1050, S. 1051, S. 1052, S. 1053, S. 1054, and H.R. 138, 77th Cong., 1st Sess. at p. 41. At the time of these hearings legislation was necessary, as Judge Parker indicated, to enable a district judge to sit on a court in banc because under Section 120 of the former Judicial Code (28 U.S.C. (1940 ed.) 216) a district judge was competent to sit on a court of appeals only to make up a three-judge court. *Textile Mills Sec. Corp.* v. *Commissioner*, 314 U.S., at 333, fn. 13. In the present Code this restriction on the competency of district judges was removed. See 28 U.S.C. 296 and the Reviser's Note to the second sentence thereof (28 U.S.C.A. 296, note); see also 28 U.S.C. 43(b) and the Reviser's Note thereto (28 U.S.C.A. 43, note). It is significant that Judge Parker was Judicial Consultant to the Judiciary Committee of the House of Representatives which supervised the 1948 revision of the Judicial Code (28 U.S.C.A., at p. xx).

cuit,[24] could assign the *entire function* of initiating a rehearing in banc to the panel consisting of one circuit judge and two district judges who had originally heard the case. (345 U.S., at 263, 267-268)

Moreover, retired judges and district judges probably participate in more than one-third of all three-judge decisions of courts of appeals.[25] These decisions are final in all but a very few cases. The administration of justice in the Federal courts plainly requires that decisions by such courts have the highest degree of prestige. Mr. Justice Frankfurter has said:

> "Rehearings are not a healthy step in the judicial process; surely they ought not to be deemed a normal procedure. Yet one who has paged the Federal Reporter for nearly fifty years is struck with what appears to be a growth in the tendency to file petitions for rehearing in the courts of appeals. I have not made a quantitative study of the facts, but one gains the impression that in some circuits these petitions are filed almost as a matter of course. This is an abuse of judicial energy. It results in needless delay. It arouses false hopes

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[24] 28 U.S.C. 43(b) provides in pertinent part:

> "Each court of appeals shall consist of the circuit judges of the circuit in active service."

[25] Chief Judge Lumbard testified on February 29, 1960 that, during 1959, 34 per cent of the work of the Second Circuit was performed by retired circuit judges and other designated and assigned circuit and district judges, and that during 1958, 40 per cent of the work of the court was performed by such judges. (Hearings on H.R. 6159 before Subcommittee No. 5, House Committee on the Judiciary, 86th Cong., 2d Sess., at pp. 195-196.) We were advised by the Administrative Office of the United States Courts that 2,705 cases were disposed of in all of the courts of appeals during 1959, that counting the hearing by one judge as one time on the panel, retired judges sat 571 times and district judges sat 690 times.

in defeated litigants and wastes their money. If petitions for rehearing were justified, except in rare instances, it would bespeak serious defects in the work of the courts of appeals, an assumption which must be rejected. It is important to bear this in mind in approaching 28 USC § 46(c). That section is directed at those relatively few instances which call for rehearings, though again rarely, in the nine courts of appeals that sit in panels.

"Rehearings en banc by these courts, which sit in panels, are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern." (*Western Pacific Railroad Case*, concurring opinion, 345 U.S., at 270.)

Nothing could be more likely to diminish the prestige of three-judge courts in which retired circuit judges or district judges sit, and to encourage lateral appeals from their decisions by way of petitions for rehearings in banc than to overrule the *Western Pacific Railroad Case* and accept the Government's contention that Section 46(c) forbids a court of appeals from calling on retired circuit judges or district judges to participate in determining whether their decisions on panels should be reheard by the court in banc. Nothing could be less likely to resolve conflicts satisfactorily between panels upon which those judges sit and other panels in the same circuit.

Finally, in assuming that Congress intended to prohibit a court of appeals from assigning *any* function in connection with rehearings in banc to retired circuit judges or district judges, the Government overlooks the decision in *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, and its reaffirmation in Section

43(b) of the present Judicial Code. In *Textile Mills*, this Court rejected the literal limitation of a court of appeals to three judges under Section 117 of the former Judicial Code[26] because some circuits had more than three circuit judges and *also* because the Chief Justice and Circuit Justices were competent to sit as judges of the court under the former Section 120.[27]

The Court said:

"In this connection it should be noted that Section 120 of the Judcial Code, 28 U.S.C.A. § 216,

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[26] Section 117 of the former Judicial Code provided:

"There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established." 28 U.S.C. (1940 Ed.) 212.

[27] Section 120 of the former Judicial Code provided:

"The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits. In case the Chief Justice or an associate justice of the Supreme Court shall attend at any session of the circuit court of appeals, he shall preside. In the absence of such Chief Justice, or associate justice, the circuit judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignments shall be designated by the court. No judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals." 28 U.S.C. (1940 Ed.) 216.

> makes the 'Chief Justice and associate justices of the Supreme Court assigned to each circuit . . . competent to sit as judges of the circuit court of appeals within their respective circuits.' Thus while the circuit court of appeals is composed primarily of circuit judges, the circuit justice is made a 'component part' of that court." (314 U.S., at 331, fn. 11)

This Court equated competency to sit as a judge of the court with competency to participate in its most important function, the decision of cases. The Court held that judges competent to sit as judges of the court were component parts thereof and competent to sit with the court in banc. (314 U.S., at 333)

Section 43(b) now provides that:

> "The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court."

The Reviser's Note to the present Section 43(b) explains that the purpose of redrafting Section 117 of the former Judicial Code was to confirm that designated and assigned justices and judges were now component parts of the court within the meaning of the *Textile Mills* case, and as fully competent as the Chief Justice and circuit justices had been at the time of the *Textile Mills* decision, either to sit on the court constituted as a three-judge court or as a court in banc. The Reviser's Note states:

> "The provision of Section 212 of Title 28 U.S.C., 1940 Ed., for a three-judge court of appeals was permissive and did not limit the power of the court to sit in banc. Thus, subsection (b) reflects

present status of law,[28] namely, that court is composed of not only circuit judges of the circuit in active service, of whom there may be more than three, but the circuit justice or justices and judges who may be assigned or designated to the court. (See *Textile Mills Sec. Corp.* v. *Commissioner of Internal Revenue*, 1942, 62 S. Ct. 272, 314 U.S. 326, 86 L. Ed. 249 and Reviser's Notes under Section 46 of this title.)"

We therefore do not agree with the Government's assumption that when Congress said without qualification

[28] The pertinent changes in the "status of law" since the *Textile Mills* decision were:

(1) The Act of December 29, 1942, 56 Stat. 1094 authorized the assignment of active and retired circuit judges from one circuit to another and amended Section 14 of the former Judicial Code to provide:

> "Each circuit judge designated and assigned to serve temporarily as a circuit judge in another circuit may and shall, during the period of his assignment, exercise all the judicial powers and discharge and perform all the judicial duties of and be subject to the same assignments of duties as the circuit judges of the circuit to which he is designated and assigned for temporary duty." (28 U.S.C. (1940 ed.) 18)

(2) The limitation on the competency of district judges to sit on the court of appeals (see p. 31, fn. 23, *supra*) was removed by providing in the first paragraph of Section 296 of the 1948 Revision:

> "A justice or judge shall discharge, during the period of his desgination and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned."

The Reviser's Note to this section explains:

> "The second sentence of the revised section was substituted for the provision of said section 18 [of Title 28, U.S.C., 1940 ed.] which subjected circuit judges to the same assignments of duty as the circuit judges of the circuit to which they are designated and assigned. The revised section extends this requirement and makes it applicable to all designated and assigned judges." (28 U.S.C.A. 296, Note)

in Section 43(b) of the Judicial Code that "justices or judges designated or assigned shall also be competent to sit as judges of the court" it intended that the effect should be the same as if it had expressly prohibited such justices or judges from participating *in any way* in in banc proceedings. The court below was plainly right when it said:

> "Moreover, § 43(b) of the Code of 1948 provides: 'Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court.' This provision is not stated to be exclusive of the 'judges designated or assigned' to hear and determine a case as members of a court *in banc*. The provision is as applicable to such judges as it is to judges designated and assigned to the divisions of the court provided for in § 46(b) and to judges designated and assigned under §§ 294 and 296. The provision thus lends further support to our conclusion that Judge Medina, who under § 46(c) was designated and assigned as a member of the court *in banc* was competent even after his retirement to sit under §§ 43(b), 294(b) and 296." (R. 139)

III. THE DECISION OF THE COURT BELOW IS VALID WITHOUT REGARD TO JUDGE MEDINA'S STATUTORY COMPETENCY TO PARTICIPATE THEREIN

The Government in its simulated role of private litigant[29] cannot question Judge Medina's competency to continue to perform judicial duties as a member of the court in banc after he retired from regular active

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[29] The libel herein was filed under the Suits in Admiralty Act, 46 U.S.C. 741, *et seq.* Section 3 of that act provides that "such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." (46 U.S.C. 743) See also *United States* v. *Isthmian Steamship Co.*, 359 U.S. 314, 324.

service. The Government was not deprived of any of its rights as a litigant because Judge Medina chose to retire from regular active service before the court's decision was reached. His vote against the Government would undoubtedly have been the same had he refrained from retiring until the case was decided. The Government had the right to a fair hearing on the appeal; it was not deprived of this right because it lost.[30]

Judge Medina did not participate in the in banc decision as a mere usurper. He continued to hold the office of circuit judge of the Court of Appeals notwithstanding his retirement from regular active service. *Booth* v. *United States*, 291 U.S. 339, 350-351. He participated in the decision in good faith under color of the authority of the office he held. He par-

[30] In a strikingly similar case, the Supreme Court of Utah unanimously held that one of its members who was on leave of absence in military service was authorized to cast a decisive vote in a case he heard before he left the court. The concurring opinion emphasized that the rights of the unsuccessful litigant were in no way prejudiced.

> "It is not contended that either taking the oath as an army officer or entrance upon active active military duty in any way actually interfered with, colored, or otherwise prejudiced the deliberations of Justice Pratt or influenced him in concurring with the views of the Chief Justice and Mr. Justice Larson. Nor is it claimed that Justice Pratt, who was then at Fort Douglas adjacent to Salt Lake City, for any practical reasons was unable to give adequate time to deliberations and consultations with other members of this court to determine how the case should be decided. In fact, it must be conceded that the same result would have been achieved as far as the majority opinion and the dissenting views are concerned, whether or not any leave of absence had been granted, or whether or not Justice Pratt ever had been called to active duty in the armed forces." *State ex rel. Jugler* v. *Grover*, 102 Utah 459, 461; 132 P. 2d 125 (1942)

ticipated therein under his assignment under Sections 46(a) and 46(c) of the Judicial Code, as a member of the court in banc. Under color of the same authority and under similar assignments under Sections 46(a) and 46(b) of the Judicial Code before he retired, he participated in decisions of 36 pending cases (in 20 of which the Government was a party), which were decided between the time of his retirement and the time of the in banc decision.[31]

A judge, who continues in good faith to perform judicial functions after his statutory authority has expired, is a *de facto* judge and his decisions are as valid and binding upon litigants as those of a *de jure* judge. *Ball* v. *United States,* 140 U.S. 118, 128-29; *United States* v. *Marachowsky,* 213 F. 2d 235, 244-45 (7th Cir.), cert. denied 348 U.S. 826; *Sylvia Lake Co.* v. *Northern Ore Co.,* 242 N.Y. 144 (1926), cert. denied 273 U.S. 695; *State ex rel. Jugler* v. *Grover,* 102 Utah 459, 462 (1942); *Shore* v. *Splain,* 258 Fed. 150 (C.A. D.C.). Cf. *Waite* v. *City of Santa Cruz,* 184 U.S. 302, 322-24.

The cases the Government cites (*American Construction Co.* v. *Jacksonville T.&K.W.R. Co.,* 148 U.S. 372; *Johnson* v. *Manhattan R. Co.,* 289 U.S. 479; *Frad.* v. *Kelly,* 302 U.S. 312) do not support its claimed privilege to attack the decision of the court of appeals in this case on the basis of Judge Medina's supposed lack of judicial competency to participate in its decision.

None of these cases, except the *Johnson* case, involved a question similar to the one involved in this case, and in all *de facto* judge cases, namely: whether

[31] These cases are listed in the Appendix, *infra,* pp. 51-52.

a litigant may challenge a judgment of a court by a collateral attack on the competency of a judge who participated therein to perform judicial duties.[32] The *Johnson* case supports our views on this point, not the views of the Government.

Each of these cases involved the question of whether a litigant could challenge a judgment by attacking the *action* taken by a judge in alleged violation of a statute or rule of court designed to assure to litigants a fair, impartial, or convenient hearing.

In *Johnson* v. *Manhattan R. Co.* the appointment of a receiver by Judge Manton was attacked on two grounds material to this discussion: First, that Judge Manton lacked judicial competency to sit on the district court in the case because, as senior circuit judge, his appointment of himself to perform such judicial duties in the district court was void; Second, that Judge Manton had improperly exercised his authority as a circuit judge assigned to the district court by hearing an application for the appointment of a receiver and appointing a receiver in violation of the rules of the district court which provided:

> "'1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the senior district judge.
>
> "'11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes

[32] An attack on a decision of a court based upon the alleged incompetency of a member thereof is a collateral attack upon the court's authority. See *Norton* v. *Shelby County*, 118 U.S. 425; *United States* v. *Alexander*, 46 Fed. 728 (D.C. Idaho, 1891); *State, ex rel. Jugler* v. *Grover*, *supra*. *Cf. Johnson* v. *Manhattan R. Co.*, 289 U.S. 479.

and any other causes (except a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules), shall be made to the judge assigned [meaning assigned by the District Judges in their division of business][33] to hold the Bankruptcy and Motion Part of the business of the court and to no other judge." (289 U.S., at 485.)

The first question—whether Judge Manton lacked judicial competency to sit on the District Court—was similar to the question presented in this case. This Court held that Judge Manton's judicial competency was not open to collateral attack by litigants, and explained:

> "And were it so open, no litigant could with any safety submit any matter to an assigned judge—a situation which would involve intolerable uncertainty and embarrassment to both public and private interests.
>
> "In the course of his opinion the District Judge suggested that the assault on the assignment and on the Senior Circuit Judge's authority to act under it 'sounded in quo warranto,' and so might possibly be regarded as being direct rather than collateral. But the suggestion was ill-grounded. Quo warranto is addressed to preventing a continued exercise of authority unlawfully asserted, not to a correction of what already has been done under it or to a vindication of private rights. It is an extraordinary proceeding, prerogative in nature, and in this instance could have been brought by the United States, and by it only, for there is no statute delegating to an individual the right to resort to it. Besides, such a proceeding, to reach its objective in a situation like that here disclosed, must be brought against the person

[33] The bracketed phrase was supplied by the Court.

> who is charged with exercising an office or authority without lawful right. The Johnson suit was not against the judge acting under the assignment, but was wholly between others who were private litigants. So, granting that an attack in a quo warranto proceeding would have been direct, and not merely collateral, it must be held that the suit before the District Judge was not such a proceeding." (289 U.S., at 501-502)

This is precisely the view we take in this case.

The second question—the right to attack the legality of the *action* taken by Judge Manton—is not material to the question presented here. We note, however, that this Court made reference to the fact that at the time the receiver was appointed,

> "the situation was one in which the assignment of a judge to take charge of the receivership, if one was to be assigned, was a task which needed to be performed upon careful consideration and with the utmost impartiality." (289 U.S., at 505)

that in disregarding the District Court rules

> "he [Judge Manton] acted hastily and, evidently with questionable wisdom." (*Ibid.*)

and that

> "This action has embarrassed and is embarrassing the receivership." (*Ibid.*)

Under those circumstances, the litigants, whose substantive rights depended upon the administration of the receivership, certainly had standing to question the legality of the actions which embarrassed its administration.

In *Frad* v. *Kelly*, there was no question concerning the competency of Judge Inch to perform judicial

duties in the United States District Court for the Eastern District of New York, the court in which the challenged action was taken. The question was whether a district judge of that court could hold hearings, sign orders and supervise from there a probationary proceeding pending in the Southern District of New York. Judge Inch was not and did not purport to be either a judge of the Southern District of New York or assigned to that district; nor had he been sitting there, under any assignment, for twenty months when he took the challenged action. He based his action squarely upon an alleged right under the Act of March 3, 1911 because he had formerly been assigned to the District Court of the Southern District of New York and, while there, had tried and sentenced the probationer in the case out of which the probation proceedings arose.[34]

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[34] In *Leary* v. *United States*, 268 F. 2d 623, the defendant argued, on much the same grounds as the Government argues here, that his conviction was illegal because *Frad* v. *Kelly* prohibited the judge from presiding in the case before the effective date of his assignment. The Government, in the *Leary* case, argued that the conviction was valid. The court agreed with the Government and held that the presiding judge was a *de facto* if not a *de jure* judge. It distinguished *Frad* v. *Kelly* upon the same basis that we have in this case. The court said:

> "Thus in the *Frad* case, a judge who had once been a regularly designated judge in one district and had decided a case therein, attempted to decide, *in another district* (in which he regularly sat), *a new matter* arising in the same case. He purported to act on a matter in a district where such matter was not then pending. This differs from the instant case where the assigned judge proposed to act in a matter which was then properly within the court's subject matter jurisdiction." (268 F. 2d, at 627; emphasis supplied by the court.)

We agree with the views of the court and of the Government in the *Leary* case.

This Court held that Judge Inch had no such right under the statute and pointed to the serious inconvenience that would ensue to the Government as a litigant, if the practice were permitted. The Court said:

> "To hold that a judge of another district, merely because he had temporarily sat at the trial and conviction of a defendant and imposed sentence, could, from that other district supervise, extend, modify or terminate the probation, would be to ignore the intent of the law. It would moreover result in confusion and inconvenience in the administration of the probation act. It would mean that the United States Attorney and his assistants, and a probation officer of the court in which the judgment is recorded, would be required to go to distant parts to be heard upon the merits of any application by the probationer and that the probationer, at his will, could institute proceedings either before a judge of the court in which his conviction is recorded or the judge in a different district who had been a temporary member of that court. Such a possibility was certainly never intended." (302 U.S., at 318)

The situation in *Frad* v. *Kelly* is unlike the situation here. Judge Medina was a circuit judge of the Court of Appeals for the Second Circuit at the time the in banc decision was rendered. (*Booth* v. *United States*, 291 U.S., at 350-351); he purported to act as a judge of that court under an assignment from that court to participate in its in banc decision. The Government suffered no inconvenience by reason of his having done so.

In *American Construction*, no question was involved as to the competency of the judge to perform judicial functions in the court in which he sat. To assure to

appellants an unprejudiced hearing on appeal, Congress had provided that no circuit judge should sit on a circuit court of appeals to hear an appeal from a decision he made. If the judge violated this statute, the appellant had not received a hearing on appeal in accordance with the standards of fairness Congress had prescribed. The appellant plainly had standing to attack the court's judgment on this ground.

The Government does not here contend that Judge Medina's participation in the in banc decision in alleged violation of Section 46(c) resulted, as in *American Construction,* in its not receiving a hearing on the appeal in accordance with standards of fairness prescribed by Congress, or as in *Johnson,* that the court, in permitting Judge Medina to participate in its in banc decision, "acted hastily and with questionable wisdom" and that its action "embarrassed and is embarrassing" proceedings in the case. On the contrary, even the dissenting judges regarded the "continued participation [of retired judges] in cases committed to their consideration [as] desirable and beneficial all around" (R. 135) and expressed "doubt as to the ultimate wisdom of the policy" of excluding such judges from in banc decisions which they thought Section 46(c) required them to advocate. (R. 140) Nor was the Government here, as in *Frad* v. *Kelly,* put to any inconvenience in presenting its case because of the alleged unlawful action.

The Government urges that it may attack the judgment of the court below because, in its opinion, Judge Medina's participation in the in banc decision frustrated the purpose of in banc proceedings. (Govt. Brief, 15-18) If Judge Medina's participation in the

case frustrated the purpose of in banc proceedings, it was a public purpose, not a private purpose, that was frustrated, and a public wrong, not a private wrong, that was perpetrated. The remedy was specific and exclusive—an action brought against him by the Government as *sovereign* in the nature of *quo warranto* to restrain him from exercising the judicial authority that the Government now alleges he lacked. (See *Johnson* v. *Manhattan R. Co.*, 289 U.S., at 502)[35] The law does not encourage unsuccessful litigants to search for defects in the judicial competency of judges who decide cases against them.

It does not matter, therefore, whether or not Judge Medina was legally authorized to exercise the judicial authority he assumed. So long as he was not restrained from its exercise in a *quo warranto* proceeding in which he was a party, his official acts were binding upon litigants. *Ex Parte Ward*, 173 U.S. 452; *Ball* v. *United States*, 140 U.S. 118; *Manning* v. *Weeks*, 139 U.S. 504. See also *Norton* v. *Shelby County*, 118 U.S. 425, 441; *McDowell* v. *United States*, 159 U.S. 596.

The principle is explained in *Norton* v. *Shelby County*, 118 U.S., at 441-442.

> "The doctrine which gives validity to acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and neces-

[35] The *de facto* cases collected in footnote 36, below, and in the Appendix, *infra*, pp. 55-56, all recognize this principle either implicitly or explicitly. For examples of explicit statements see *Anderson* v. *Morton*, 21 App. D.C. 444, 449-50 (1903); *Curtin* v. *Barton*, 139 N.Y. 505, 511-12, 34 N.E. 1093 (1893); *Commonwealth* v. *DiStasio*, 297 Mass. 347, 351, 8 N.E. 2d 923 (1937); *Desmond* v. *McCarthy*, 17 Iowa 525, 527 (1854); *State ex rel. Madden* v. *Crawford*, 207 Ore. 76, 90, 295 P. 2d 174 (1956).

> sity, for the protection of the public and individuals whose interests may be affected thereby. Officers are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result, if in every proceeding before such officers their title could be called in question."

It is universally applied to judges.[36]

The entire administration of justice depends upon its preservation.

> "The supremacy of the law could not be maintained or its execution enforced if the acts of a judge having colorable but not a legal title were to be deemed invalid." (*Sylvia Lake Co.* v. *Northern Ore Co.*, 242 N.Y. 144, 147 (1926), cert. denied, 273 U.S. 695.)

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[36] This principle has been applied to judges by this Court in *Ex Parte Ward*, 173 U.S. 452; *Ball* v. *United States*, 140 U.S. 118; *Manning* v. *Weeks*, 139 U.S. 504, and by courts of appeals of seven circuits and the District of Columbia. *Shore* v. *Splain*, 258 Fed. 150, 153 (C.A.D.C.); *Lukrig Collieries Co.* v. *Interstate Coal & Dock Co.*, 287 Fed. 711, 713 (2d Cir.), cert. denied, 262 U.S. 751; *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 266 F. 2d 427, 430, fn. 1 (3d Cir.); *Sharfsin* v. *United States*, 265 Fed. 916, 917-18 (4th Cir.); *Sykes* v. *Sanford*, 150 F. 2d 205 (5th Cir.); *United States* v. *Marachowsky*, 213 F. 2d 235, 244-45 (7th Cir.); cert. denied, 348 U.S. 826; *Morris* v. *United States*, 19 F. 2d 131, 133 (8th Cir.); *Leary* v. *United States*, 268 F. 2d 623, 627 (9th Cir.). Cases from forty-five States, the then territories of Alaska and Hawaii, Canada and England in which courts have applied or expressly approved the application of the principle to judges are collected in the Appendix, *infra*, pp. 55-56.

The decision of the court below, therefore, should be affirmed without regard to the question presented in the Government's petition.

CONCLUSION

For the foregoing reasons, the judgment of the court below should in all respects be affirmed.

Respectfully submitted,

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April, 1960.

APPENDIX.

28 U.S.C. 294(d) provides:

> No retired justice or judge shall perform judicial duties except when designated and assigned.

28 U.S.C. 296 provides:

> A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.
>
> Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.
>
> A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

Retired judges participated in the decisions of the following cases which were submitted to their consideration as members of a three-judge court before they retired:

Decision[37]	Judge (and Date of Retirement)
Boston Mutual Life Ins. Co. v. *Insurance Agents Internat'l Union*, 268 F. 2d 556 (1st Cir.), heard June 2, 1959 and decided July 22, 1959	Chief Judge Magruder (June 12, 1959)
French v. *Gibbs Corporation*, 189 F. 2d 787 (2d Cir.), heard May 1, 1951 and decided June 7, 1951	Chief Judge Hand (June 1, 1951)
Makowsky v. *Pavlick*, 262 F. 2d 13 (3d Cir.), heard Nov. 20, 1958 and decided Jan 2, 1959	Judge Maris (Dec. 31, 1958)
British Transport Commission v. *United States*, 230 F. 2d 139 (4th Cir.), heard Jan. 7, 1956 and decided Feb. 13, 1956	Judge Dobie (Feb. 1, 1956)
American Motorists Insurance Co. v. *Trinity Universal Insurance Co.*, 240 F. 2d 67 (5th Cir.), heard Dec. 5, 1956 and decided Jan. 18, 1957	Judge Borah (Dec. 31, 1956)
Niagara Fire Insurance Co. v. *Bryan & Hewgley Inc.*, 195 F. 2d 154 (6th Cir.), heard Nov. 27, 1951 and decided Mar. 14, 1952	Chief Judge Hicks (Mar. 1, 1952)
Bennett v. *United States*, 231 F. 2d 465 (7th Cir.), heard Feb. 10, 1956 and decided April 4, 1956	Chief Judge Major (Mar. 23, 1956)
A. E. West Petroleum Co. v. *Atchison, T. & S.F. Ry. Co.*, 212 F. 2d 812 (8th Cir.), heard Dec. 1, 1953 and decided May 4, 1954	Judge Thomas (May 1, 1954)
Monge v. *Smyth*, 229 F. 2d 361 (9th Cir.), heard Oct. 25, 1955 and decided Jan. 17, 1956	Judge Orr (Jan. 1, 1956)
McMullens v. *Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50 (10th Cir.), heard Nov. 15, 1955 and decided Jan. 10, 1956	Chief Judge Phillips (Jan. 1, 1956)

[37] Dates of oral argument when not shown in the reports were obtained from the Clerks of the respective courts.

Decisions in Which Judge Medina Participated, Without Any New Designation or Assignment, Between March 1, 1958, the Date of His Retirement, and July 28, 1958, the Date of the In Banc Decision of the Court Below

Case	Heard	Decided
Perlman v. *Commissioner of Internal Revenue*, 252 F. 2d 890	Feb. 6, 1958	Mar. 4, 1958
Vermont Structural Slate Co. v. *Tatko Bros. Slate Co.*, 253 F. 2d 29	Feb. 4, 1958	Mar. 6, 1958
Riegelman's Estate v. *Commissioner of Internal Revenue*, 253 F. 2d 315	Dec. 12, 1957	Mar. 10, 1958
United States v. *Paradise*, 253 F. 2d 319	Feb. 7, 1958	Mar. 26, 1958
Maher v. *Isthmian Steamship Co.*, 253 F. 2d 414	Jan. 17, 1958	Mar. 11, 1958
In re New Haven Clock & Watch Co., 253 F. 2d 577	Jan. 15, 1958	Mar. 28, 1958
In re Allen N. Spooner & Sons, Inc., 253 F. 2d 584	Nov. 18, 1957	Mar. 10, 1958
New York Credit Men's Adjustment Bureau, Inc. v. *Samuel Breiter & Co.*, 253 F. 2d 675	Jan. 13, 1958	Mar. 25, 1958
United States v. *15.03 Acres of Land*, 253 F. 2d 698	Feb. 5, 1958	Apr. 2, 1958
Norda Essential Oil & Chemical Co. v. *United States*, 253 F. 2d 700	Nov. 7, 1957	Jan. 31, 1958
Rehearing denied		Apr. 14, 1958
Lewis v. *Commissioner of Internal Revenue*, 253 F. 2d 821	Dec. 11, 12, 1957	Apr. 7, 1958
Excelsior Hardware Co. v. *John Hancock Mut. L. Ins. Co.*, 254 F. 2d 6	Feb. 1958	Apr. 7, 1958
Frasier v. *Public Service Interstate Trans. Co.*, 254 F. 2d 132	Jan. 17, 1958	Apr. 16, 1958
Bennett v. *The Mormacteal*, 254 F. 2d 138	Feb. 7, 1958	Mar. 13, 1958
United States ex rel. Farnsworth v. *Murphy*, 254 F. 2d 438	Dec. 13, 1957	Apr. 15, 1958
United States v. *Palmiotti*, 254 F. 2d 491	Dec. 9, 1957	Apr. 18, 1958

Case	Heard	Decided
Monteiro v. *Sociedad Mar. San Nicolas, S.A.*, 254 F. 2d 514	Jan. 14, 15, 1958	Apr. 14, 1958
Murray v. *New York, N. H. & H. R. Co.*, 255 F. 2d 42	Feb. 5, 1958	May 5, 1958
Roth v. *United States*, 255 F. 2d 440	Apr. 30, 1958	May 22, 1958
United States v. *A-1 Meat Co.*, 255 F. 2d 491	Feb. 4, 5, 1958	May 23, 1958
United States v. *Eastport Steamship Corp.*, 255 F. 2d 795	Nov. 6, 1957	May 6, 1958
Grace Line, Inc. v. *United States*, 255 F. 2d 810	Nov. 6, 1957	May 6, 1958
Isthmian Steamship Co. v. *United States*, 255 F. 2d 816	Nov. 6, 1957	May 6, 1958
Isbrandtsen Co. v. *United States*, 255 F. 2d 817	Nov. 6, 1957	May 6, 1958
United States v. *Beard*, 256 F. 2d 76	Feb. 7, 1958	May 23, 1958
Bliss v. *Commissioner of Internal Revenue*, 256 F. 2d 533	Feb. 4, 1958	June 18, 1958
Hight v. *United States*, 256 F. 2d 795	Jan. 16, 1958	June 18, 1958
Wagman v. *Arnold*, 257 F. 2d 272	Feb. 6, 1958	June 13, 1958
United States v. *Ross*, 257 F. 2d 292	Feb. 4, 1958	July 2, 1958
Smith v. *Sinclair Refining Co.*, 257 F. 2d 328	Feb. 7, 1958	July 7, 1958
Dellaripa v. *New York, N. H. & H. R. Co.*, 257 F. 2d 733	Feb. 3, 1958	July 7, 1958
Georgia-Pacific Corp. v. *United States Plywood Corp.*, 258 F. 2d 124	Dec. 12, 1957	July 1, 1958
Atalanta Trading Corp. v. *Federal Trade Commission*, 258 F. 2d 365	Jan. 16, 1958	July 28, 1958
N. L. R. B. v. *Adhesive Products Corp.*, 258 F. 2d 403	Jan. 15, 1958	July 3, 1958
Deep Sea Tankers, Limited v. *The Long Branch*, 258 F. 2d 757	Dec. 10, 11, 1957	July 14, 1958
Reardon v. *California Tanker Co.*, 260 F. 2d 369	Nov. 8, 1957	Apr. 7, 1958

Decisions in Which Judge Magruder Participated Without Any New Designation or Assignment Between June 12, 1959, the Date of His Retirement, and November 5, 1959

Cases:	Heard[38]	Decided
Eagle of Gloucester, Inc. v. *Consolidated Fisheries, Inc.*, 268 F. 2d 555	May 12, 1959	July 8, 1959
Boston Mutual Life Ins. Co. v. *Insurance Agents International Union*, 268 F. 2d 556	June 2, 1959	July 22, 1959
N.L.R.B. v. *New England Upholstery Co.*, 268 F. 2d 590	June 2, 1959	July 8, 1959
Rehearing denied		July 28, 1959
Connolly v. *Farrell Lines, Inc.*, 268 F. 2d 653	May 12, 1959	July 22, 1959
Raybestos-Manhattan, Inc. v. *Texon, Inc.*, 268 F. 2d 839	June 3, 1959	July 29, 1959
Rehearing denied		Aug. 26, 1959
Goldfine v. *United States*, 268 F. 2d 941	May 13, 1959	July 24, 1959
Rehearing denied		Aug. 14, 1959
Kelley v. *Hansen*, 268 F. 2d 947	June 3, 1959	July 28, 1959
Fournier v. *Gonzalez*, 269 F. 2d 26	Feb. 3, 1959	July 29, 1959
Griffin Wellpoint Co. v. *Munro-Langstroth Inc.*, 269 F. 2d 64	Apr. 8, 1959	July 31, 1959
Tessier v. *United States*, 269 F. 2d 305	May 15, 1959	July 31, 1959
Oskoian v. *Canuel*, 269 F. 2d 311	June 4, 1959	Aug. 3, 1959
Merchants National Bank v. *Morriss*, 269 F. 2d 363	Apr. 7, 1959	July 31, 1959
American Auto Insurance Co. v. *United States*, 269 F. 2d 406	Mar. 3, 1959	July 24, 1959

[38] Dates of oral argument were obtained from the Clerk, United States Court of Appeals for the First Circuit.

Cases:	Heard[38]	Decided
Campbell v. *United States*, 269 F. 2d 688	June 5, 1959	Aug. 27, 195
Rehearing denied		Sept. 15, 195
Angoff v. *Goldfine*, 270 F. 2d 185	Apr. 10, 1959	Sept. 10, 195
Aro Mfg. Co., Inc. v. *Convertible Top Replacement Co.*, 270 F. 2d 200	June 4, 1959	Aug. 31, 195
United States v. *Praught*, 270 F. 2d 285	May 13, 1959	Aug. 31, 195
Schell v. *Ford Motor Co.*, 270 F. 2d 384	June 3, 1959	Sept. 1, 195

[38] Dates of oral argument were obtained from the Clerk, United States Court of Appeals for the First Circuit.

Cases approving the application of the de facto principle to judges

STATE COURTS:

Mayo v. *Stoneum*, 2 Ala. 390 (1841)
Keith v. *State*, 49 Ark. 439, 5 S.W. 880 (1887)
Matter of Danford, 157 Cal. 425, 108 Pac. 322 (1910)
Butler v. *Phillips*, 38 Colo. 378, 88 Pac. 480 (1906)
State v. *Carroll*, 38 Conn. 449 (1871)
State ex rel. Atty. Gen. v. *Gleason*, 12 Fla. 190 (1868)
Merchants and Planters Bank v. *Citizens Bank of Hazlehurst*, 147 Ga 366, 94 S.E. 229 (1917)
State v. *Nolan*, 31 Idaho 71, 169 Pac. 295 (1917)
People ex rel. Ballou v. *Bangs*, 24 Ill. 184 (1860)
Hiday v. *State*, 64 Ind. App. 159, 115 N.E. 601 (1917)
Desmond v. *McCarthy*, 17 Iowa 525 (1854)
State v. *Roberts*, 130 Kan. 754, 288 Pac. 761 (1930)
Orme v. *Commonwealth*, 21 Ky. L. Rep. 1412, 55 S.W. 195 (1900)
State v. *Sanderson*, 169 La. 55, 124 So. 143 (1929)
Woodside v. *Wagg*, 71 Me. 207 (1880)
Kimble v. *Bender*, 173 Md. 608, 196 Atl. 409 (1938)
Commonwealth v. *DiStasio*, 297 Mass. 347, 8 N.E. 2d 923 (1937)
People v. *Butkewicz*, 223 Mich. 35, 193 N.W. 879 (1923)
Burt v. *Winona & Peter R. Co.*, 31 Minn. 472, 18 N.W. 285 (1884)
Powers v. *State*, 83 Miss. 691, 36 So. 6 (1903)
State v. *Miller*, 111 Mo. 542, 20 S.W. 243 (1892)
Ex Parte Parks, 3 Mont. 426 (1880)
Ex Parte Johnson, 15 Neb. 512, 19 N.W. 594 (1884)
Mallett v. *The Uncle Sam Gold & Silver Mining Co.*, 1 Nev. 188 (1865
State v. *Boiselle*, 83 N.H. 339, 143 Atl. 704 (1928)
Byer v. *Harris*, 77 N.J.L. 304, 72 Atl. 136 (1909)
Switz v. *Middletown Township*, 40 N.J. Super. 217, 122 A. 2d 649 (1956
State v. *Blancett*, 24 N.M. 433, 174 Pac. 207 (1918)
Nelson v. *People*, 23 N.Y. 293 (1861)
Curtin v. *Barton*, 139 N.Y. 505, 34 N.E. 1093 (1893)

Sylvia Lake Co. v. *Northern Ore Co.*, 242 N.Y. 144, 151 N.E. 158 (1926)
State v. *Lewis*, 107 N.C. 967, 12 S.E. 457 (1890)
Youmans v. *Hanna*, 35 N.D. 479, 161 N.W. 797 (1917)
Stiess v. *State*, 103 Ohio St. 33, 132 N.E. 85 (1921)
Sheldon et al. v. *Green*, 182 Okla. 208, 77 P. 2d 114 (1938)
State ex rel. Madden v. *Crawford*, 207 Ore. 76, 295 P. 2d 174 (1956)
Clark v. *Commonwealth*, 29 Pa. 129 (1858)
Angell v. *Steere*, 16 R.I. 200, 14 Atl. 81 (1888)
Cromer v. *Boinest*, 27 S.C. 436, 3 S.E. 849 (1887)
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